

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

LAURA HASSELL, et al.,)	
)	
Plaintiffs,)	CIVIL NO. 1999-0053
)	
v.)	
)	
GOVERNOR CHARLES W. TURNBULL, Ph.D., and)	_____
the GOVERNMENT OF THE UNITED STATES)	
VIRGIN ISLANDS,)	
)	
Defendants.)	
_____)	

APPEARANCES

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Memorandum Opinion

Finch, Chief Judge

This matter is before the Court for a decision on the merits following a bench trial conducted on September 21 and 22, 1999. The Court, having considered the testimony of witnesses, the exhibits and depositions offered into evidence at trial, and the arguments of counsel, now enters this memorandum opinion as its findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52.

Findings of Fact

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. § 1983 as applied to the U.S. Virgin Islands pursuant to 48 U.S.C. § 1561 as amended.

2. Plaintiffs initiated this action on March 22, 1999, alleging that they were terminated from their employment in violation of their First and Fourteenth Amendment rights. Additionally, Plaintiff Laura Hassell alleges a violation of 3 V.I.C. § 530.

3. At trial Plaintiffs advised the Court that they would proceed with the damages phase of their claim at a later date, and that at this time they are seeking permanent injunctive relief requiring the Defendants to rescind notices of termination given to Plaintiffs and reinstate them as employees of the Government of the Virgin Islands (the “Government”).

4. Prior to the issuance of this Memorandum Opinion, a Settlement Under Seal was entered into by Plaintiff Bianca O. Maynard and Defendants.

5. In August of 1995, Plaintiff Alicia Torres-Gustave (“Gustave”) commenced employment with the Government as Deputy Commissioner of the Department of Tourism for the island of St. Croix (“Deputy Commissioner of Tourism”).

6. In April of 1998, Gustave requested a transfer to the vacant position of Regional

Director of Offshore Offices (“Regional Director”), headquartered in Atlanta, Georgia. This transfer request was granted on or about May 26, 1998.

7. Gustave held both the Deputy Commissioner of Tourism position and the Regional Director position as an exempt employee, and in regard to both positions she never applied to join the classified service.

8. Gustave testified that the Department of Tourism is one of the most important departments in the Government and that she would describe it as the life blood of the Government’s economy.

9. As Regional Director, Gustave had oversight responsibilities for all of the Offshore Offices of the Department of Tourism. The Department of Tourism has offshore offices in Atlanta; Los Angeles; Miami; New York City; Chicago; Washington, D.C. and Puerto Rico. Gustave’s testimony revealed that she had a substantial amount of contact with the public in order to promote the Virgin Islands as a tourist destination. She testified that, as Regional Director, she traveled representing the Virgin Islands and acted as a spokesperson for the Commissioner and Department of Tourism. Gustave further testified that she made recommendations regarding the Offshore Offices’ budgets.

10. Gustave publicly supported Governor Roy L. Schneider (“Schneider”) during his first election campaign in 1994, but she was off-island during his reelection campaign in 1998.

11. On March 1, 1999, Gustave received written notice that her employment with the Government was terminated effective March 5, 1999. No reason was given for her termination.

12. On January 31, 1995, Plaintiff Francisco D. Jarvis (“Jarvis”) commenced employment with the Government as Deputy Commissioner of Housing, Parks and Recreation. His Notice of

Personnel Action (“NOPA”) lists this position as exempt. Jarvis never applied to join the classified service.

13. On December 24, 1997, Jarvis received a contract permitting him to attend college for one year while still receiving his salary. Thus, he is on study leave and presently not employed by the Government.

14. Jarvis is Schneider’s nephew, and publicly supported his reelection campaign, serving as co-Chair of the Young Virgin Islanders for the Twenty-First Century committee and attending rallies and fund raisers.

15. There are no prescribed duties for a Deputy Commissioner of Housing, Parks and Recreation as performed by Jarvis. However, Section 301, Title 3 of the Virgin Islands Code authorizes the Governor to appoint such Deputy Commissioners as he deems necessary for the efficient operation of the Department to carry out such duties as prescribed by the Commissioner.

16. Jarvis testified that his duties included developing recreational programs;¹ running the athletic and recreational programs at parks and facilities on St. Thomas and St. John; and, in the absence of the Commissioner and the two Assistant Commissioners, the authority to act as Commissioner.

17. On February 3, 1999, Jarvis was notified that because of budgetary constraints his employment with the Government was terminated, effective immediately.

18. On November 29, 1995, Plaintiff Audrey Callwood (“Callwood”) commenced employment with the Government as Coordinator of Special Events for the Department of

¹ However, Jarvis later testified that he never actually developed any new recreational programs.

Tourism. Callwood was hired as an exempt employee. On August 13, 1999, approximately four years after Callwood first joined the exempt service, she notified the Division of Personnel of her election to become a member of the classified service.

19. Callwood had no defined job specification. She testified that her understanding of the duties and responsibilities of her position came from the Commissioner who told her that the Government wanted to emphasize local and federal holidays. In accordance with this request, Callwood testified that she organized special events which revolved around historical and cultural affairs. For example, for Martin Luther King Day she created and implemented a march from the Catholic Cathedral to the Emancipation Garden where a festival was then held.

20. Callwood supported Schneider in his election and reelection campaigns, serving on both the Friends of Roy and Women for Roy Committees and on the Public Relations Committee of the Friends of Roy Committee.

21. Callwood testified that prior to receiving her termination notice, she was threatened on a daily basis by Turnbull supporters who told her that “she was going home.”

22. Callwood was terminated by notice dated February 11, 1999, effective February 12, 1999. At that time no reason was given for her termination. However, at trial, Assistant to the Governor of the Virgin Islands for Public Affairs and Policy Initiatives, James O’Bryan, Jr. (“O’Bryan”) testified that Callwood was fired because her position had originally been assigned to Government House, and was being transferred from Tourism back to Government House. This testimony contradicts Callwood’s NOPA which states that her position was newly created and not transferred.

23. Plaintiff Patrick Sprauve (“Sprauve”) was hired as a Special Projects Coordinator

with the Department of Finance in June of 1995.

24. As Special Projects Coordinator with the Department of Finance, Sprauve's responsibilities included auditing departments, participating in the restructuring of the Department, and other duties as assigned.

25. On March 26, 1997, Joanne Bozzuto, Acting Commissioner of Finance, notified Sprauve that effective April 1, 1997, he was being assigned to the Governor's Home Protection Roofing Program "for the duration of the roofing program." His responsibilities included acting as a coordinator between the Program and the Department of Finance.

26. A new NOPA, reflecting Sprauve's reassignment, was issued on May 7, 1997. Sprauve retained his title as Special Projects Coordinator. Sprauve's NOPA lists his position as exempt. He never applied to join the classified service.

27. During the time that Sprauve worked for the Home Protection Roof Program with the Department of Property and Procurement, he was still considered part of the Department of Finance and received his pay from that Department's funds.

28. The evidence indicates that Sprauve's assignment to the Home Protection Roof Program was a temporary one, and it was understood that he would return to his duties with the Department of Finance at the conclusion of the Program.

29. Sprauve publicly supported Schneider in the 1998 reelection campaign. Sprauve was a member of the Men for Roy Committee, co-chair of the Youth Committee and acted as a Public Relations assistant. He also served on the Cultural Committee, and appeared on radio programs in support of Schneider. On Election Day, Sprauve went around to each polling station with food and drink for the Schneider campaigners.

30. On February 19, 1999, Sprauve received a letter informing him that because of changing program needs and budgetary constraints, he was being terminated effective March 5, 1999.

31. The evidence indicates that since Governor Turnbull took office, 24 persons have been newly hired by the Department of Finance.

32. Plaintiff Eileen Jackson ("Jackson") was employed by the Government on September 8, 1995, as Special Aide for JOBS within the Department of Human Services, a federally funded position designed to transition welfare workers back to the job force. Jackson's NOPA lists this position as exempt. She never applied to join the classified service.

33. Jackson testified that the duties and responsibilities of her position involved giving motivational speeches to students, coordinating their appreciation awards, and instructing them in the basic skills necessary to find employment, including use of the telephone and preparation of resumes.

34. Jackson publicly supported Schneider in his election and reelection campaigns, serving on the Cultural Committee, the Fund Raising Committee, the Women for Roy Committee, the Friends of Roy Committee, and as chairperson for the Public Relations Committee. Jackson also has a weekly radio program on WSTA which she used as a platform to assist Schneider's reelection efforts. On Election Day, Jackson actively campaigned at the Bertha C. Boschulte polling station, where she was seen by Governor Turnbull and Lieutenant Governor, Luz James.

35. By letter dated April 9, 1999, Jackson was notified that because of budgetary constraints the Government was terminating her employment, effective immediately. At trial the Government argued that the decision to terminate Jackson was also based upon the determination

of Commissioner Halbert of the Department of Human Services that her position was one of thirteen (13) positions within that Department deemed unnecessary and excess.

36. The evidence indicates that of the eleven (11) programs receiving funding from the identical federal source, Jackson was the only individual within said programs who was terminated. The evidence also indicates that of the thirteen (13) employees identified as holding non-essential positions within the Department of Human Services, Jackson was the only individual from the list who was terminated.

37. Plaintiff Maxwell George (“George”) was employed by the Government on November 11, 1996, as the Revenue Accounts Manager at the Department of Health. George’s NOPA lists this position as exempt. He never applied to join the classified service.

38. George testified that his duties and responsibilities as Revenue Accounts Manager involved running the department, making sure the revenues came in, and doing the collections for St. Thomas, St. John and St. Croix. George also testified that his job required the management of a staff of 26.

39. George actively supported Schneider in his reelection campaign, serving as Chairman of the Men for Roy Committee.

40. On April 6, 1999, George received a notice that because of budgetary constraints the Government was terminating him, effective immediately. At trial the Government argued that the decision to terminate George was also based upon the recommendation of the Commissioner of Health, Dr. Wilbur Calendar, who advised Governor Turnbull that George’s position was an unnecessary excess position which should be eliminated.

41. Plaintiff Laura Hassell (“Hassell”) was employed by the Government as Director of

Environmental Health within the Department of Health on August 21, 1995. Hassell's NOPA lists this position as exempt.

42. Hassell served as the Territorial Director of Environmental Health for the entire Virgin Islands.

43. On November 12, 1997, less than 90 days after her second anniversary in the position, Hassell notified the Division of Personnel of her election to become a member of the classified service. The Division of Personnel has never responded to her notice of election.

_____ 44. The duties inherent in the Position of Director of Environmental Health as signed and certified by Hassell in the Position Description Questionnaire (PDQ) are:²

- (a) to plan, organize and direct a program of Environmental health for the Department of Health;
- (b) to act as an expert advisor or consulting specialist on sanitation and Public Health problems to the Commissioner, other governmental departments and nonofficial organizations;
- (c) to direct all engineering investigations, surveys and inspections performed by personnel of the Health Department;
- (d) to prepare the budget for divisional programs;
- (e) to enforce Public Health Standards for all three programs within the division;

² At trial, Hassell testified that a later job description, identified as Plaintiffs' Exhibit 67, which she created, is the official job specification for the Director of Environmental Health position. However, the Court finds that both the later job description and the PDQ should be considered in determining the job duties inherent to the position of Director of Environmental Health. Because Plaintiffs' Exhibit 67 does not expand upon the duties already reflected in the PDQ, the Court will not list those duties separately in this opinion.

- (f) to develop, plan and direct programs for the control of disease vector such as mosquitoes, flies, rats and roaches;
- (g) to perform in-service trainings;
- (h) to prepare annual and other periodic reports for the Commissioner and all programs within the division;
- (i) to attend numerous meetings representing the Commissioner and the division;
- (j) to supervise all employees in executing assignments. Approximately forty percent of Hassell's work includes the following supervisory tasks: directing daily periodic activities of subordinates, giving daily work assignments, disciplining subordinates, approving their time sheets and leave requests, and interviewing and hiring job applicants for vacant positions within the Environmental Protection unit.

45. Hassell actively supported Schneider's reelection campaign, serving as a member of Women for Schneider, Co-Chair of the Public Relations Committee of the Friends of Roy Committee and attending fund raising events. Hassell also campaigned for Schneider at the Kirwan Terrace polling station where she was seen by Charles Turnbull, Luz James, and James O'Bryan on Election Day.

46. Hassell was terminated from her employment by letter dated February 18, 1999 effective on February 19, 1999. No reason was given for her termination. The Government now alleges that Hassell was terminated because the Governor wanted to replace her with a Director of his own choosing.

47. Plaintiff Jeremiah Lee ("Lee") was a former temporary Government employee under a FEMA grant. He was assigned to the Department of Planning and Natural Resources ("DPNR")

as a Project Inspector in the Hazard Mitigation Project following Hurricane Marilyn. The position of Project Inspector is an exempt position. Lee was terminated when the program expired.

48. Subsequent to his termination from the temporary Building Inspector position, Lee, on May 8, 1998, applied for the position of Trades Inspector in the DPNR. Lee was the only applicant for the position.

49. The Government claims that Lee was never hired by former Governor Schneider to the position of Trades Inspector, that he is not qualified for the position, and that the Government lacks the money to hire him. The evidence contradicts the Government's assertions.

50. Lee was given an acceptance form by the Government, dated October 8, 1998. The form provides in relevant part: "I hereby accept the appointment tendered me [Jeremiah Lee] by you [the Government], of Trades Inspector in the Dept. of Planning & Nat. Res. of the District of St. Thomas - St. John" Plaintiff Lee Exhibit No. 9.

51. Lee subsequently completed a number of forms required to begin his employment, including a W-4 form and a Loyalty Statement, also dated October 8, 1998.

52. A form letter was placed in Lee's personnel file congratulating him on his appointment to his new permanent position with the Government.

53. A NOPA for Lee's new position was generated by DPNR and delivered to the Division of Personnel. The NOPA bears the stamp of the Division of Personnel, indicating that it was received by the Department.

54. The Government has failed to produce the original NOPA for inspection by the Court.

55. The Assistant Director of Personnel, Mr. Godfrey Fredericks, Jr. ("Fredericks"),

testified that NOPAs are maintained in locked file cabinets in the Division of Personnel, which is responsible for maintaining them. The only other places that a NOPA could be located would be in the applicable Department, at the Office of the Governor, or in the possession of an employee of the Government while in transit between those locations. In all cases, the NOPA would always remain in the possession of the Government.

56. On or about December 17, 1998, Lee had a telephone conversation with then Governor Schneider, in which Schneider acknowledged to Lee that he had signed Lee's NOPA.³

57. The Court concludes that the NOPA was signed by Schneider.

58. The Government's second argument for failing to either hire or retain Lee - - that he is not qualified for the position - - is also not persuasive. The statement that Lee was unqualified for the position of Trades Inspector, upon which the Government relies, is contained in a Qualification Rating Sheet signed by Joanne Christopher on April 22, 1998. This document indicates that Lee is not qualified for the position, because he did not possess a license in a trade such as plumbing, electrical or contracting. However, the Notice of Vacancy sets out the qualification requirements for the position of Trades Inspector, and that document contains no such requirement. The authentication of the Qualification Rating Sheet is also highly suspect in that it was purportedly signed on April 22, 1998, whereas Lee did not submit his written application for the position until May 8, 1998 - - 16 days after he had purportedly been found unqualified for the position. Moreover, Lee was subsequently accepted for the position and was

³ Although the Court initially excluded, at the request of the Government's counsel, testimony regarding the statement of Schneider to the effect that he had signed the NOPA, that same counsel subsequently elicited exactly that same testimony during cross-examination of Lee. Defense counsel never objected to that testimony, nor did counsel move to strike the testimony. Thus, the statement is admissible.

given an acceptance form which contains an acknowledgment that the Government had offered him the position of Trades Inspector.

59. The Government's final reason for not hiring Lee - - lack of money in the Department - - is also highly suspect. The evidence indicates that since January, 1999, DPNR has given out raises of at least \$14,000 per year to employees of the DPNR and has hired a total of 26 new employees at rates of pay ranging from \$7.21 per hour to \$31.25 per hour.

60. The position of Trades Inspector is a classified position.

61. Lee and his wife Betty Mann Lee were both active in the reelection campaign of Schneider. Mr. Lee served on several committees, assisted in fund raising, and accompanied Schneider in door to door canvassing. Mrs. Lee was also on a number of committees, and spoke at public meetings in support of Schneider.

Findings of Fact Common to all Plaintiffs

62. Governor Turnbull ("Turnbull") testified that he made the final decision as to the termination of the Plaintiffs in this case.

63. Plaintiffs were told that unless they signed a written request to be placed in the exempt service, they would not be paid.

64. Fredericks testified that there was no indication in any of the personnel files that the Director of Personnel ever notified any of the Plaintiffs, with more than two years service, of their right to elect to become classified.

65. During a press conference held on February 18, 1999, Defendant Governor Charles Turnbull attributed certain decisions for firing government employees to "disloyalty to the administration."

66. The Court finds that Defendants fired Plaintiffs for their political expression, namely, for their public support of Schneider's election and reelection campaigns.

67. The Court finds that in regard to Plaintiff Lee, Defendants failure to hire him was based on his political expression, namely, his public support of Schneider's reelection campaign.

68. The Court finds that the Defendants' reason for firing Plaintiffs, namely budgetary concerns, is unpersuasive based on the evidence of raises and new hires.

Conclusions of Law

Conclusions of Law applicable to all Plaintiffs, except Jeremiah Lee

1. Defendants may lawfully terminate government employees for politically-motivated reasons if the employees are policymakers. Elrod v. Burns, 427 U.S. 347, 373 (1976). In order to determine whether an employee holds a policy-making position, the Court must evaluate several factors: an individual's technical competence; power to control others; authority to speak in the name of policymakers; influence on programs; ability to affect government decision-making on issues where there is room for disagreement; degree of meaningful input into decision-making concerning the nature and scope of a major program; authority to prepare budgets; authority to hire or fire employees; and public perception. See Brown v. Trench, 787 F.2d 167, 169-170 (3d Cir. 1986); Nekolny v. Painter, 653 F.2d 1164, 1170 (7th Cir. 1981); Ecker v. Cohan, 542 F.Supp 896, 901 (E.D.N.Y. 1982).

2. Furthermore, the Court must focus its analysis on the "function[s] of the public office in question and not the actual past duties of the particular employee involved." Brown, 787 F.2d at 168; see also O'Connor v. Steeves, 994 F.2d 905, 911 (1st Cir. 1993)("the actual past duties of

the discharged employee are irrelevant if the position inherently encompasses more expansive powers and more important functions that would tend to make political affiliation an appropriate requirement for effective performance” (citation omitted)).

3. Applying the above standards, the Court finds the following positions to be policy-making positions: Gustave’s position as Regional Director of Offshore Offices in the Department of Tourism, Jarvis’ position as Deputy Commissioner of Housing Parks and Recreation, and Hassell’s position as Director of Environmental Health. Therefore, Defendants termination of their jobs did not violate the First Amendment. See Elrod, 427 U.S. at 373.

4. Applying the same standards, the Court finds that the positions held by Plaintiffs George, Jackson, Sprauve and Callwood were not policy-making positions; thus, firing these Plaintiffs for their political expression violated the First Amendment. See Elrod, 427 U.S. at 375.

5. For public employees to succeed on a Fourteenth Amendment due process claim, they must have a property interest in their continued employment. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 541 (1985). The property interests protected by the Due Process Clause of the Fourteenth Amendment “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law - - rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972).

6. In the instant case, any property interests Plaintiffs may have in their continued employment derive from the Virgin Islands statute governing the territory’s Personal Merit System. 3 V.I.C. §§ 451-690 (1967 and Supp. 1999). Specifically, Section 530, Title 3 of the Virgin Islands Code states: “[W]here a department head . . . decides to dismiss, demote, or

suspend a *regular employee*. . .he shall furnish the employee with a written statement of the charges against him. The employee shall have ten days following the date of receipt of said statement of the charges to appeal the proposed action to the Public Employees Relations Board.” 3 V.I.C. § 530 (Supp. 1999)(emphasis added).

7. Section 451a divides all government positions into two categories: the “career service” (synonymous with “classified service”) and the “exempt service” (synonymous with “unclassified service”). See 3 V.I.C. § 451a (1995). Those employees found to be in the career service have a “‘clear and legitimate expectation of continued employment,’ and enjoy extensive safeguards against arbitrary dismissal.” Richardson v. Felix, No. 84-72, 1987 U.S. Dist. LEXIS 16027, at *7 (D.V.I. July 9, 1987), aff’d 856 F.2d 505 (3d Cir. 1988), (quoting Shuster v. Thraen 18 V.I. 287, 295 (D.V.I. 1981)). Exempt employees are not guaranteed the same protection. Shuster, 18 V.I. at 294; see also 3 V.I.C. § 530 (Supp. 1999).

8. The “exempt” positions include, *inter alia*, those of Deputy Commissioners and employees in positions of a policy-determining nature. 3 V.I.C. §§ 451a(b)(1) & (8). Further, “[a]ll positions in the Executive Branch of the United States Virgin Islands Government not exempted under subsection (b) of [§ 451a] shall be in the career service.” 3 V.I.C. § 451a(c).

9. Plaintiffs George, Jackson, Sprauve and Callwood held positions that are not exempt under subsection (b) of Section 451a. Furthermore, it is the definition of “career” and “exempt” in Section 451a of Title 3 of the V.I. Code and not the NOPA which determines whether a position is in the career service or the exempt service. See Richardson v. Felix, 856 F.2d 505, 511 (3d Cir. 1988). Therefore, the Court finds that Plaintiffs George, Jackson, Sprauve, and Callwood held positions in the career service.

10. Furthermore, the election forms that Plaintiffs were required to execute were of no legal effect. See Hassell v. Department of Health, PERB-GSA-99-30, stating that Act 5336 “applies only to those employees in a career service position before the Government’s reorganization in 1987, who were made exempt by Act 5225. Those employees may not be forced into an exempt position, and may only be so placed if they voluntarily elect in writing. This form of letter does not apply to every exempt position, even though the Government seems to have made a practice of making every employee in an exempt position sign such a letter.” Because Plaintiffs did not hold their positions prior to 1987, Act 5336 does not apply to them. Moreover, even if Act 5336 applied to Plaintiffs, the Court finds that because Plaintiffs’ written requests to join the exempt service were not voluntary elections, they have no legal effect on the status of their employment. See Act March 24, 1988, No. 5336, § 6(b), Sess. L. 1988, p. 124.

11. Additionally and for the sake of argument, the fact that Plaintiffs George, Jackson and Sprauve did not elect to become members of the career service and that Callwood did not make a timely election does not affect their career-service status or their right to elect to join the career service within a reasonable period of time from the date of entry of this Judgment. See 3 V.I.C. § 498(a) (1995). The 90-day time period to make an election to join the career service as prescribed by 3 V.I.C. § 498(b) is not an absolute bar against granting career status when such election is made after 90 days of being eligible. As this Court stated in its Memorandum Opinion dated September 21, 1999: “It is inequitable for the Government to escape liability for failing to inform a Government employee of his ability to elect to join the [career] service, see Brandon v. District of Columbia Bd. of Parole, 823 F.2d 644, 648 (D.C. Cir. 1987) (‘a state does not violate an individual’s federal constitutional right to procedural due process merely by deviating from its

own established procedures'), if an otherwise qualified employee can be prevented from entering the [career] service because his application was fourteen months late." Sumter v. Turnbull, No. 99-0045 (D.V.I. Sept. 21, 1999).

12. To receive the procedural benefits of Section 530, the government employee "must have been at the time of his [or her] termination not only a career service employee but also a regular employee." Richardson, 856 F.2d at 509. A "regular employee" is defined as "an employee who has been appointed to a position in the [career] service in accordance with this chapter after completing his working test period." 3 V.I.C. § 451 (1995). According to the personnel regulations, the maximum length of an employee's probational or "working test" period shall be no more than twelve months. V.I.R. & Regs. tit. 3, § 454-161(b) (1986); see also Richardson, 856 F.2d at 509.

13. Plaintiffs George, Jackson, Sprauve and Callwood were employed for more than twelve (12) months. Therefore, each of these Plaintiffs has a constitutionally protected property interest in his or her position as a regular employee of the Government of the Virgin Islands. See 3 V.I.C. § 530 (Supp. 1999). Accordingly, the Fourteenth Amendment rights of Plaintiffs George, Jackson, Sprauve and Callwood were violated by Defendants.

14. On June 16, 1999, this Court ruled that Gustave and Jarvis were exempt employees who could be terminated without notice under Virgin Islands law. The Court therefore concluded that Gustave and Jarvis held no protected property interest in their continued employment. See Hassell, et al v. Turnbull, et al., No. 99-0053 (D.V.I. June 16, 1999)(order granting in part and denying in part Defendants' Motion for Summary Judgment).

15. Because Hassell held a position of a policy-determining nature, she is an exempt

employee under Section 451a(b)(8) of Title 3 of the Virgin Islands Code. See 3 V.I.C. § 451a(b)(8) (1995). Furthermore, Hassell's election to be placed in the career service pursuant to Section 498(a) of Title 3 of the V.I. Code is of no effect, because the provisions of Section 498 do not apply to those employees in the exempt service pursuant to Section 451(b). 3 V.I.C. § 498(d) (1995). Therefore, as an exempt employee, Hassell had no protected property interest in her continued employment and could be terminated at any time. See Richardson v. Felix, 856 F.2d 505, 509 (3d Cir. 1988). Accordingly, Hassell's Section 530 claim is denied.

16. The Court concludes that Defendants did not violate the Fourteenth Amendment rights of Plaintiffs Gustave, Jarvis, and Hassell.

Conclusions of Law applicable to Plaintiff Jeremiah Lee

17. When the contents of a document are relevant to an issue in a case, the trier of fact generally may receive the fact of the document's nonproduction or destruction as evidence that the party that has prevented production did so out of well-founded fear that the contents would harm him. See Gumbs v. International Harvester, Inc., 718 F.2d 88, 96 (3d Cir. 1983). In Gumbs, the court provides: "For the rule to apply, it is essential that the evidence in question be within the party's possession or control. Further, it must appear that there has been an actual suppression or withholding of the evidence; no unfavorable inference arises when the circumstances indicate that the document . . . in question has been lost or accidentally destroyed, or where the failure to produce it is otherwise properly accounted for." Gumbs, 718 F.2d at 96.

18. In the instant case, based upon the statement of Schneider that he had signed the NOPA for Lee, the admission of Fredericks that the originals of all the NOPAs should always be in the physical possession of the Government, and the Government's failure to properly account

for its inability to produce the original NOPA, the Court concludes that the information contained in the NOPA would harm the interests of the Government. Therefore, the Court concludes that the NOPA for Lee was actually signed by the Governor of the Virgin Islands at the time, Schneider, and that the NOPA was signed some time before the December 17, 1998, telephone conversation between Schneider and Lee.

19. Further, “where the written instrument cannot be produced either through its loss, destruction or custody by one who fails or refuses to produce it, it is competent for the party who asserts its existence to prove its contents by secondary evidence either parol or written.” Cooper v. Brown, 126 F.2d 874, 877 (3d Cir. 1942).

20. Inasmuch as the NOPA for Lee was signed by the then Governor of the Virgin Islands, Schneider, Lee’s employment became effective at the time of the signing, on or about December 17, 1998. See 3 V.I.C. § 526(a) (1995) (“Appointments to the classified service shall be effective as and when made by the Governor . . .”).

21. The protection of First and Fourteenth Amendment rights are guaranteed in the case of a failure to hire, just as they are in the case of a termination based upon political speech and political activity. See Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990) (holding that Elrod and Branti apply to promotion, transfer, recall, and hiring decisions based on party affiliation and support). Therefore, Defendants’ failure to hire Lee for his political activity was unlawful.

22. Finally, because the Court finds that the issue of back pay is more appropriate for the damages phase of this claim, the determination regarding Lee’s claim for back pay will not be decided at this time.

Qualified Immunity

23. Defendant Turnbull has plead as an affirmative defense that this action is barred as to him by the doctrine of qualified immunity.

24. “[G]overnment officials performing discretionary functions . . . generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.” Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In addressing a qualified immunity claim, the Court must first ascertain whether Plaintiffs’ claims make out a violation of a constitutional right. Only if such a violation is shown, need the Court proceed to determine whether in light of “clearly established law,” the unlawfulness of the action would have been apparent to the reasonable official. See Siegert v. Gilley, 500 U.S. 226, 231 (1991).

25. Plaintiffs George, Jackson, Sprauve, Callwood, and Lee have made out a violation of a constitutional right. Further, the law violated in the instant case is clearly established. Finally, since a reasonably competent official should know the law governing his conduct, the Governor is not entitled to qualified immunity with respect to the constitutional claims of Plaintiffs George, Jackson, Sprauve, Callwood and Lee. See Good v. Dauphin County Social Serv. 891 F.2d 1087, 1091 (3d Cir. 1989).

26. Because Plaintiffs Jarvis, Gustave and Hassell have not made out a violation of a constitutional right, Defendant Turnbull is immune from personal liability with respect to these Plaintiffs.

ENTER:

DATED: December __, 1999

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:

Orinn F. Arnold

Clerk of Court

by:

Deputy Clerk

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

LAURA HASSELL, et al.,

Plaintiffs,

)
)
)
)

CIVIL NO. 1999-0053

v.)	
)	
GOVERNOR CHARLES W. TURNBULL, Ph.D., and)	_____
the GOVERNMENT OF THE UNITED STATES)	
VIRGIN ISLANDS,)	
)	
Defendants.)	
_____)	

ORDER

Pursuant to this Court's Findings of Fact and Conclusions of Law, it is hereby

ORDERED that judgment be entered in favor of Plaintiffs George, Jackson, Sprauve, Callwood, and Lee and against Plaintiffs Jarvis, Gustave and Hassell. Defendants are permanently enjoined from acting upon Plaintiff George's April 6, 1999 termination, Plaintiff Jackson's April 9, 1999 termination, Plaintiff Sprauve's March 5, 1999 termination, and Plaintiff Callwood's February 12, 1999 termination. Defendants are further ordered to reinstate Plaintiff Lee to the position of Trades Inspector with the Department of Licensing and Consumer Affairs, effective as of December 17, 1998. Nothing in this Order shall preclude Plaintiffs George, Jackson, Sprauve, Callwood, and Lee from being dismissed pursuant to lawful procedures.

ENTER:

DATED: December ____, 1999

RAYMOND L. FINCH
U.S. DISTRICT JUDGE

A T T E S T:
Orinn F. Arnold
Clerk of Court

by: _____
Deputy Clerk

